

Service Date: December 4, 1995

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF BURLINGTON	)	TRANSPORTATION
DIVISION		
NORTHERN RAILROAD COMPANY, Petition	)	
to Close Libby/Troy Dualized Agency and	)	DOCKET NO. T-94.51.RR
Complaint by Transportation Communications	)	
International Union.	)	ORDER NO. 6373a

**FINAL ORDER**

**APPEARANCES**

**FOR THE APPLICANT:**

Leo Berry and Mark D. Etchart, Browning, Kaleczyc, Berry, and Hoven, P.C., Attorneys at Law, P.O. Box 1697, Helena, Montana 59624

**FOR THE PROTESTANTS:**

James T. Mular, Legislative Director TCU, 440 Roosevelt Drive, R-1, Butte, Montana 59701, on behalf of Transportation Communications International Union

**FOR THE COMMISSION:**

Martin Jacobson, Staff Attorney, and Wayne Budt, Transportation Division Administrator, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601

**HEARD BEFORE:**

BOB ROWE, Commissioner and Hearings Examiner

**FINAL ORDER BEFORE:**

NANCY MCCAFFREE, Chair  
DAVE FISHER, Vice-Chair  
BOB ANDERSON, Commissioner  
DANNY OBERG, Commissioner  
BOB ROWE, Commissioner

**INTRODUCTION**

1. On May 11, 1994 Burlington Northern Railroad Company (BN) filed before the Public Service Commission (PSC) a petition to discontinue agency services at its dualized agency

facility serving Libby and Troy, Montana. BN's petition does not concern the Libby agency facility itself.

2. On May 17, 1994 BN filed a petition to modify a previous PSC Order consolidating the Libby and Troy agencies, Matter of Burlington Northern, Libby and Troy Agencies, Docket No. T-8764, Order No. 5655 (December 18, 1985). BN's petition to modify was made on the basis that no shipper has requested service at Troy.

3. On May 19, 1994 the Transportation Communications International Union (TCU) filed a complaint before the PSC, alleging that BN has, without first obtaining approval from the PSC: reduced the number of agency staff at its Libby facility; transferred its Libby agency functions to its Whitefish, Montana, centralized agency; and refused to provide agency services to Troy. On June 8, 1994 TCU also intervened in BN's petition to discontinue agency services.

4. On July 5, 1994 the PSC denied (interim) BN's May 17, 1994 motion to modify the previous Libby/Troy agency Order and consolidated that motion with BN's petition to discontinue agency services for final action. On July 22, 1994 the PSC consolidated BN's petition and TCU's complaint as above-entitled.

5. On July 22, 1994 the PSC issued a notice of TCU's complaint to BN. On August 12, 1994 BN answered the complaint, denying the allegations, asserting that the allegations amount to legal conclusions which BN is not required to admit or deny, challenging TCU's standing, and challenging PSC jurisdiction over the matters asserted.

6. Hearing on the consolidated petition and complaint was held on September 16, 1994 in Libby. Evidence and public comment was taken. The parties agreed that a proposed order would be issued without briefing, arguments being reserved for the procedure on exceptions. The Proposed Order (Order No. 6373) was issued on August 15, 1995. On September 8, 1995 BN filed exceptions. The PSC now adopts the Proposed Order's findings of fact and conclusions of law, with amendment as necessary to reflect the context of a final order and with amendment as may be justified in response to BN's exceptions.

#### BN EXCEPTIONS AND RELATED MOTION

7. BN takes exception to three aspects of the Proposed Order. BN also has filed a related motion pertaining to practice before the PSC.

8. BN's first exception bears on the Proposed Order requirements for a supplemental proceeding on the issue of staffing at the Libby agency on January 1, 1987. BN argues that the requirement be stricken as TCU did not carry its burden on this issue and neither the evidentiary record nor the applicable law support such proceeding. The PSC disagrees. The evidence of record supports a finding that there were no less than six staff assigned to the Libby agency on January 1,

1987, and that this staff was performing agent functions. BN did not dispute this. The evidence of record demonstrates that there is now one agent assigned to the Libby agency. The PSC takes judicial notice that BN has not applied to the PSC for approval to reduce staff at the Libby agency as required by statute. The proceeding is necessary to verify and obtain details on this issue from all parties. In further regard to this exception BN's comparison between the instant Proposed Order and the Final Order (Order No. 6370a) for BN's Forsyth agency (Docket No. T-94.49.RR) is not accurate. In Forsyth the record had disclosed that of the ten employees staffing the Forsyth agency on January 1, 1987, only the agent and immediate relief engaged in activities related to shipment and delivery of freight on any notable basis. For Libby it remains unclear whether the staff performed agency services all of the time, some of the time, or none of the time.

9. BN's second exception pertains to the Proposed Order's use of the word "instruct" in regard to expectations that the PSC might have in relation to BN's continued rail service and related activities at Libby. Without necessarily agreeing with all of BN's arguments on this exception, the PSC will replace the word "instruct" with "request."

10. BN's third exception is in regard to the Proposed Order's reporting requirements. Again, without necessarily agreeing with all of BN's arguments, the PSC will make the requirement a request.

11. BN's motion regarding practice before the PSC relates to representation of TCU by James Mular (not an attorney). Mr. Mular has filed a "Brief and Request for Supplemental Proceeding," apparently in response to the Proposed Order's requirement for supplemental proceedings. BN's motion seeks clarification as to whether Mr. Mular can participate in such fashion or whether TCU must retain legal counsel for representation. The PSC determines that TCU must be represented by legal counsel for any act that constitutes the practice of law. What constitutes the practice of law is not always clear, but the PSC believes that it encompasses the filing of briefs and motions on behalf of another. The PSC will not consider, and BN need not respond to, the document filed by Mr. Mular on behalf of TCU.

### FINDINGS OF FACT

#### a. General

12. All preliminary or introductory matters which can properly be considered as findings of fact and should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

b. TCU's Complaint

Troy

13. The evidence obtained at hearing relating to TCU's complaint on the Troy agency is uncontradicted. At hearing TCU submitted evidence that the Libby agent no longer travels to Troy and apparently has not done so for some time. BN provided testimony that there is, and has been, no shipper at Troy and it has therefore been unnecessary for the agent to travel to Troy. The PSC finds that the Libby agent has not recently traveled to Troy. The PSC finds that there has been no shipper at Troy. The PSC finds that the agent was available for Troy service if a shipper needed the agent.

Staffing Reduction at Libby

14. TCU's evidence related to reduction of the number of staff performing agency functions at Libby is primarily testimony from the present Libby agent, Donald Erickson. Erickson testified that he is the agent at Libby and that he is the only agent. He testified that there were six positions at the Libby agency on January 1, 1987 -- one agent/telegrapher, one clerk/telegrapher, one clerk, and three guaranteed rotating extra board employees. He testified that all performed services related to the receiving and shipping of freight, but no details were otherwise provided. According to Erickson the positions were abolished by BN in February, 1987. BN submitted no evidence in rebuttal. The PSC finds that BN now routinely maintains one agent working normal business hours five days per week at Libby. The PSC finds it likely that there were more positions providing agency services on January 1, 1987.

Transfer of Agency Functions

15. The evidence relating to transfer of Libby and Troy dualized agency services to Whitefish is minimal. TCU and BN appear to agree that, although BN has implemented a centralized service at Whitefish and provided shippers with the opportunity to conduct business through that centralized service, an agent has remained stationed at Libby. The PSC finds that BN has made available an opportunity for shippers to transact Libby area business with BN through BN's Whitefish central agency. There is no substantial credible evidence of record that would demonstrate that BN unlawfully transferred agency functions from Libby to Whitefish. The Libby agent has been available to perform agency services and has performed those services when required.

c. BN's Petition

16. BN has previously sought authority to discontinue agency services at Libby. See, Matter of Burlington Northern, Libby Agency, PSC Docket No. T-9910, Order No. 6189 (April 22, 1993). That petition was denied because the burdens on the service area's major shipper (then Champion International) would be great in the absence of the local agent and those burdens could

not be adequately met by service from BN's Whitefish central agency. In that matter the PSC found that the local agent facilitated communications between the shipper and train crews and monitored the supply and spotting of cars. The PSC then concluded that a local agent was necessary to adequately accomplish these things.

17. In its present petition, BN asserts that the circumstances at the Libby/Troy agency have changed, as the major shipper has changed and the new shipper (Stimson Lumber) does not have the same concerns. BN asserts that the shipper is not opposed to discontinuing agency services at Libby. Because the new shipper did not appear at hearing, there is no evidence to contradict this. The PSC finds that the problems apparent as to service to the major shipper in the earlier proceeding have been reduced.

18. One shipper witness, Dennis Woody (Petrolane), testified at hearing. Testimony indicated that: Petrolane was likely to increase shipments into Libby (from 3 cars annually to 100 cars annually); it had always been contacted by the local agent when cars had arrived before; and it would like the same service now. BN asserted that it can adequately provide car arrival information from Whitefish. The PSC finds that BN can adequately provide car arrival information from Whitefish.

19. Public testimony, primarily through Bill Bischoff, on behalf of the Lincoln County Board of Commissioners (submitting a letter from the county commissioners), raised concerns about: losing Amtrack service; a fuel-gelling problem (safety) experienced during Libby's cold weather; and the effect that the loss of the agent may have on the local economy.

20. In other regards BN's evidence on its new petition remains the same as that in the previous one. BN feels that it must computerize and centralize its customer service operations in order to remain competitive in the transportation marketplace. BN feels that it can provide a better and 24 hour service through computerization and centralization. BN provided testimony that the Libby/Troy agency remains profitable.

## CONCLUSIONS OF LAW

### a. General

21. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this Order are incorporated herein as conclusions of law.

22. The PSC has jurisdiction over BN's petitions and TCU's complaint. See, ' 69-14-202, MCA; see also, ' ' 69-1-102 and 69-14-111, MCA, and Title 69, ch. 14, MCA. TCU has standing to complain and standing to intervene as a member of the public and as a representative of

its union members who are agents. See, ' 69-14-202, MCA; and see generally, Title 69, ch.14, part 10, MCA.

23. Discontinuation of agency services is specifically governed by Montana statute. ' 69-14-202, MCA (a railroad's duty to furnish shipping and passenger facilities) provides:

(1) Every person, corporation, or association operating a railroad in the state on January 1, 1987, or a successor thereto, shall maintain and staff facilities for shipment and delivery of freight and shall ship and deliver freight and accommodate passengers in such facilities as were maintained and staffed on January 1, 1987.

(2) However, if a person, corporation, or association operating a railroad demonstrates to the public service commission, following an opportunity for a public hearing in the community where the facility is situated, that a facility is not required for public convenience and necessity, the commission shall authorize the closure, consolidation, or centralization of the facility. In determining public convenience and necessity, the commission shall, prior to making its decision, weigh and balance the facts and testimony presented at the hearing, including the facts and testimony presented by the general public, the existing burdens on the railroad, the burdens placed upon the shipping and general public if the application is granted, and any other factors the commission considers significant to provide adequate rail service.

24. In accordance with this statute railroad agency facilities must be maintained as they were maintained and staffed on January 1, 1987, unless the railroad demonstrates to the PSC that public convenience and necessity does not require the facility. In determining whether public convenience and necessity does require the facility the PSC considers all factors significant to the provision of adequate rail service and the burdens on the shipping and general public and the railroad, weighing and balancing all evidence, including public testimony.

25. In TCU's complaint TCU has the burden of demonstrating that the complaint is justified. In BN's petition BN has the burden of demonstrating that public convenience and necessity does not require the local agent.

b. TCU's Complaint

Troy

26. Evidence related to TCU's complaint concerning the BN agent's presence and service at Troy is simple and not disputed. BN's Libby agent has not traveled to Troy. There has not been a shipper or other apparent need for continued agent presence at Troy.

27. As background, in Matter of Burlington Northern, Libby and Troy Agencies, PSC Docket No. T-8764, Order No. 5655, @ p. 10 (December 18, 1985), in granting BN dualization of the Libby and Troy agencies, the PSC required BN to "provide agency services at both locations on a daily basis by working at both stations at set hours and as required by the shippers." Given this

Order and ' 69-14-202, MCA, BN would be required to first obtain authority from the PSC rather than unilaterally determine that an agent need not be physically present at Troy.

28. Without more, the facts and law favor TCU on this point. However, there is more and the outcome must be different. The PSC cannot rule in favor of TCU (or rule at all) because the issue (of BN's Libby agent service at Troy) has previously been presented as an issue in Matter of Burlington Northern, Complaint Regarding Troy Depot Removal, PSC Docket No. T-9968 (the issue was identified as a complaint and briefed as an issue). The issue, as well as all others in that complaint, were disposed of by settlement, signed by BN and TCU. The issue of agent services was not excepted from the settlement. TCU's complaint on this issue is dismissed as a matter that has been previously been resolved.

Staffing Reductions at Libby

29. TCU's evidence related to BN's reduction in staff at the Libby and Troy agency is not rebutted by BN. This un rebutted evidence demonstrates that on January 1, 1987 there were six positions at the Libby agency and all performed services related to receiving and shipping freight. The evidence does not show the precise extent to which these staff performed the required work related to freight, but it is clear that they did some.

30. Section 69-14-202, MCA, principally applies to a railroad's furnishing of freight (and passenger) services and it must be construed with this in mind. However, BN has been put on notice that the statute is not restricted in application only to an individual designated by the railroad as an "agent." It speaks in terms of "staffing" not in terms of "agents." So long as the railroad "staff" is performing freight shipment and delivery type services or is available to perform the same, such "staff" is within the application of the statute. The statute requires a continuation of specific maintenance of staff and facilities (for shipment and delivery of freight) as were maintained on the applicable date (January 1, 1987), unless the railroad obtains authority from the PSC to reduce that staff. See generally, Matter of Burlington Northern, Hardin Agency Complaint, Docket No. T-9573, Order No. 6072, && 76 and 77 (February 12, 1992).

31. The record shows that on January 1, 1987 BN had six employees performing agency-related functions. Presently BN has one full time agent. However, the PSC will not yet conclude that BN unlawfully reduced its staff at the Libby agency. This issue is important enough to warrant an opportunity for a supplemental proceeding (procedure described in the Order provisions). The following paragraph describes at least one concern that should be considered by the parties.

32. The extent to which agency staff performs agency services may be material. If BN had designated agents or if BN had staff (any designation) dedicated to a substantial extent to providing agency services at Libby and eliminated those, a conclusion will likely favor TCU. However, it is likely, but not absolute, that the analysis in Hardin was not intended to be applied to

staff who, as a mere minor incident to other tasks, were performing agency functions only a small percent of the time, but only to designated agents and others performing as an agent (shipment and delivery of freight) on a substantial basis.

Transfer of Agency Functions

33. In regard to transfer of agency functions, TCU's complaint is not justified. In some instances it has appeared that BN has a strategy of eliminating shipper need for local agency services by eliminating those services. Such strategy has been declared unacceptable to the PSC. See generally, Matter of Burlington Northern, Froid Agency, Docket No. T-93.116.RR, Order No. 6289, & 29 (April 12, 1994).

34. A railroad must obtain PSC approval prior to closing, consolidating, or centralizing an agency. In the past BN has appeared to have attempted to first transfer local agency duties to a central agency, remove local agent responsibilities, and then apply to the PSC for closure -- the local agency being closed, consolidated, or centralized prior to BN's petition. The PSC has declared that it will no longer tolerate this course of conduct by BN. See generally, Matter of Burlington Northern, Glasgow Agency, Docket T-93.115.RR, Order No. 6277, && 18 and 19 (February 4, 1994).

35. At the same time the PSC has declared that its intentions are not to present obstacles to the modernization of BN's operations. The PSC simply has a statutory obligation to ensure that the public convenience and necessity is not compromised by a railroad's actions done prior to review by the PSC. Id., & 20; see also, Order on Reconsideration, Order No. 6277a (April 6, 1994). In regard to this aspect of agency services, the PSC has also held that so long as a railroad continues to maintain and staff agencies as they were maintained and staffed on January 1, 1987, having its staff performing agency functions pertaining to the shipment and delivery of freight or available to perform the same as needed, and so long as these agency services are adequately performed by the railroad, whether through the agency or some other means, the railroad is in compliance with ' 69-14-202, MCA. See, Matter of Burlington Northern, Hardin Agency Complaint, Docket No. T-9573, Order No. 6072, & 80 (February 12, 1992).

36. Under all facts presented, what has occurred at Libby is not perceived by the PSC as a substantial problem or violation by BN. In Libby BN has centralized agency functions and thereby provided an opportunity in shippers to work through a centralized facility, but BN also maintained a local agent to perform the functions or be available to perform them as needed. BN gave shippers an option to obtain service from Whitefish. At the same time it maintained a local agent at Libby for service as needed and as a conduit for shipper communication between Libby and Whitefish.



c. BN's Petition

37. BN has either corrected the problems identified in the previous petition or the new shipper does not share the previous shipper's concerns. There is no other shipper opposition to discontinuance of Libby agency operations (although Petrolane indicated that it wanted to receive the same service as it has with the local agent, Petrolane did not oppose BN's petition). In the absence of direct shipper opposition to closure it is difficult to conclude that an agency should remain open. There is no evidence that the Whitefish centralized agency is unable to provide the required services. When there is no evidence suggesting that a centralized agency would be unable to provide the services provided by a local agent the PSC cannot conclude that a burden will be placed on the shipping public by allowing closure of the agency. Matter of Burlington Northern, Malta Agency, Docket No. T-9914, Order No. 6191, & 28 (April 26, 1993). In the absence of shipper opposition to a petition to close it is difficult for the PSC to conclude as a matter of law that the public convenience and necessity requires that a railroad continue to offer local agency services. See generally, Matter of Burlington Northern, Harlem Agency, Docket No. T-93.117.RR, Order No. 6283, & 18 (March 1, 1994).

38. The public concern about Amtrack services is legitimate. However, the local agent does not provide Amtrack services. Discontinuance of agency services does not affect Amtrack. Although the PSC does support continued service by Amtrack, Amtrack is a federal agency over which the PSC has no jurisdiction. BN's petition does not involve closure of any facility at the Libby agency.

39. In regard to safety (the concern being fuel-gelling) the law allows discontinuation of agency services. As Matter of Montana Rail Link, Garrison Agency, Docket T-9984, Order No. 6241a (reconsideration), && 41 and 42 (October 5, 1993), generally outlines, the PSC has categorized burdens on the general nonshipping public, as opposed to the shipping, as being "safety" or "others." When considering testimony on such burdens the PSC has generally concluded that it must be shown that in the absence of the agent there will be serious safety problems or other significant problems that an agent is uniquely able to prevent or solve. See, Matter of Burlington Northern, Hysham Agency, Docket No. T-9182, Order No. 5866, & 30 (December 11, 1989); and Matter of Union Pacific, Silverbow Agency, Docket No. 9447, Order No. 6036a, & 22 (January 21, 1992). In regard to safety the PSC has also concluded that it will examine whether the local agent by defined duties or course of conduct provides an essential safety function which is necessary to provide adequate rail service. See generally, Matter of Burlington Northern, Sidney Agency, Docket No. T-9632, Order No. 6094, & 16 (April 8, 1992). The PSC concludes that the local agent in Libby, by defined duties or course of conduct, does not provide an essential safety function and is not in a

unique position to prevent or solve the safety problem referenced. However, BN is requested to continue to work with the local governments on safety matters.

40. The PSC is concerned about possible effects on the local economy and requests that BN work with the current and new customers to ensure high quality service. However, on the facts presented, the law allows discontinuation of agency services. As Matter of Montana Rail Link, Garrison Agency, Id., alludes, this burden would be categorized in "others." When considering testimony on such burdens the PSC has generally concluded that it must be shown that in the absence of the agent there will be other significant problems that an agent is uniquely able to prevent or solve. In the context of public convenience and necessity and shipment and delivery of freight, based on the record in this case, effects on the local economy (by loss of an agent) should be avoidable through the centralized agency.

41. Adequate agency services are also important to support future economic growth, including expansion by existing shippers. Based on the record in this case, the PSC concludes that BN's centralized agency will be able to adequately provide the required service. BN is requested to work with Libby and Troy area shippers to meet these needs.

#### ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an order.

2. All pending objections, motions, exceptions, and arguments not specifically having been ruled on in this Order, if any, shall be deemed denied, to the extent that such denial is consistent with this Order.

3. Being fully advised of all premises it is HEREBY ORDERED that: TCU's complaint concerning BN's agency services at BN's Troy agency is DENIED; TCU's complaint concerning BN's transfer of agency services is DENIED; and BN's application for discontinuation of agency services at the Libby/Troy agency facility is GRANTED.

4. It is FURTHER ORDERED that in TCU's complaint regarding BN's reduction in staffing at the Libby agency supplemental proceedings are necessary. In this regard the parties are instructed to file briefs with supporting documents and affidavits as may be necessary on the issue within 30 days of the service date of this Order. Briefs shall indicate the parties' positions on whether a decision should be made on the record as it now exists, the law applicable to the facts of record, the extent of the violation (if any), the remedy that should be applied (if any), and whether a supplemental factual hearing is appropriate or necessary. The PSC reserves the right to conduct discovery at any time during the supplemental proceedings. The parties are encouraged to settle the dispute, if possible.

5. BN shall afford affected employees protection pursuant to applicable provisions within Title 69, ch. 14, part 10.

6. BN is expected to remain a responsible presence in the Libby and Troy area. BN is requested to continue working with the shipping public to improve communication and service. BN is requested to continue to provide Petrolane car arrival information in a reasonably acceptable manner.

7. BN is requested to work with Lincoln County Commissioners, law enforcement, and other concerned officials to ensure communications concerning public safety can occur without problem.

8. The PSC and BN have ongoing responsibilities to Lincoln County. Six months from the date of this Order, BN is requested to provide the PSC a written report on its compliance with the requirements of this Order. That report should also include a summary of car volumes by shipper, and a report of any complaints or comments concerning agency service, by shippers, officials, or members of the public.

Done and dated this 7th day of November, 1995, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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NANCY MCCAFFREE, Chair

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DAVE FISHER, Vice Chair

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BOB ANDERSON, Commissioner

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DANNY OBERG, Commissioner

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BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.